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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

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10 JULIE LYNN SCHIFFMAN,

Plaintiff,

v.

11 MICHAEL J. ASTRUE, Commissioner of the
Social Security Administration,

Defendant.

12
13 Case No. C10-1642-RSM-BAT

**REPORT AND
RECOMMENDATION**

14 Julie Lynn Schiffman seeks review of the denial of her Disability Insurance Benefits
15 application. She contends the ALJ erred, at step two, by failing to find that her Chronic Fatigue
16 Syndrome (CFS) and mental health problems were severe impairments, and by improperly
17 discounting her testimony. Dkt. 13. As discussed below, the Court recommends the
18 Commissioner's decision be **REVERSED** and **REMANDED** for further administrative
19 proceedings.

20 **FACTUAL AND PROCEDURAL HISTORY**

21 Ms. Schiffman is currently 39 years old, has a GED, and has worked as a bank teller,
22 customer service representative, and an administrator for a pregnancy crisis home.¹ On June 27,
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¹ Tr. 86, 121, 124.

1 2007, she applied for benefits, alleging disability as of June 15, 2007. The application was
2 denied initially and on review.² After conducting a hearing on March 10, 2010, the ALJ found
3 Ms. Schiffman not disabled.³ As the Appeals Council denied Ms. Schiffman's request for
4 review, the ALJ's decision is the Commissioner's final decision. Tr. 1.

5 **THE ALJ'S DECISION**

6 Utilizing the five-step disability evaluation process,⁴ the ALJ made the following
7 findings:

8 **Step one:** Ms. Schiffman had not worked since June 15, 2007.

9 **Step two:** Ms. Schiffman had the following severe impairments: fibromyalgia, a left
knee strain, and Raynaud's phenomenon.

10 **Step three:** These impairments did not meet or equal the requirements of a listed
imPAIRMENT.⁵

12 **Residual Functional Capacity:** Ms. Schiffman could perform the full range of light
work. She must avoid exposure to extremes of cold or dampness.

13 **Step four:** As Ms. Schiffman could perform her past work as a bank teller, customer
service/credit clerk, and residence supervisor she was not disabled.

15 Tr. 11-14.

16 **DISCUSSION**

17 **A. The ALJ's step two findings regarding CFS**

18 Ms. Schiffman contends the ALJ erred at step two in failing to find CFS to be a severe
19 impairment. Dkt. 14 at 12. The Commissioner concedes error but argues the ALJ's error is
20 harmless because the ALJ adopted Dr. Mark Heilbrunn's opinions about how CFS impaired Ms.
21 Schiffman, and incorporated those opinions in assessing Ms. Schiffman's residual functional

22 ² Tr. 43, 48.

23 ³ Tr. 6-18.

⁴ 20 C.F.R. §§ 404.1520, 416.920.

⁵ 20 C.F.R. Part 404, Subpart P. Appendix 1.

1 capacity. *Id.* The record, however, does not support the Commissioner's arguments.

2 There is no evidence the ALJ incorporated Dr. Heilbrunn's or any other doctor's opinions
3 about limitations associated with CFS in assessing Ms. Schiffman's residual functional capacity.
4 The ALJ's discussion about the medical evidence pertaining to CFS is skimpy. At step two, the
5 ALJ made no mention of CFS, and also made no mention that Dr. Heilbrunn diagnosed Ms.
6 Schiffman with CFS. Tr. 11. The ALJ's avoidance of any discussion of CFS continued
7 throughout the decision. For example, in assessing Ms. Schiffman's residual functional capacity
8 at step four, the ALJ found the medical evidence showed "the claimant has a history of
9 Raynaud's phenomenon and a constellation of symptoms including fatigue and pain, without
10 firm identification for the etiology of her symptoms." Tr. 12. This finding indicates the ALJ
11 believed there was no medical evidence that Ms. Schiffman suffered from CFS. Tr. 11. This
12 interpretation of the ALJ's finding is consistent with the ALJ's subsequent discussion of Dr.
13 Heilbrunn's opinions. The ALJ found "Dr. Heilbrunn diagnoses fibromyalgia, Raynaud's
14 phenomenon and left knee pain, post patellar dislocation." Tr. 13. But, the ALJ did not indicate
15 whether Dr. Heilbrunn diagnosed Ms. Schiffman as suffering from CFS, and if so, what
16 limitations it caused. Similarly, the ALJ discussed the opinions of James Prickett,⁶ M.D., and
17 Robin Caldwell, M.D. regarding fibromyalgia but omitted any mention of whether these doctors
18 had diagnosed Ms. Schiffman with CFS. *Id.*

19 Although the ALJ decisions does not mention CFS, the Commissioner argues that
20 because there is a "considerable overlap of symptoms between CFS and fibromyalgia" the ALJ
21 addressed CFS by recognizing Ms. Schiffman suffered from fibromyalgia. Dkt. 14 at 13. This
22 may be a sensible argument, but as the ALJ's decision contains no indication the ALJ adopted
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⁶ The ALJ refers to Dr. Prickett as Dr. Pickett. Tr. 13.

1 this line of reasoning, neither will the Court. *See Pinto v. Massanari*, 249 F.3d 840, 847-48 (9th
2 Cir. 2001). Moreover, a close review of the ALJ's decision indicates the ALJ completely
3 rejected the CFS diagnosis rather than incorporating it in his assessment of Ms. Schiffman's
4 residual functional capacity and testimony. This is shown by the ALJ's statement that he was
5 rejecting Ms. Schiffman's testimony about fatigue, lack of stamina and need to rest because the
6 medical reports show "no signs of these problems." Tr. 14. Had the ALJ found Ms. Schiffman
7 suffered from CFS at step two and incorporated symptoms of this impairment in his assessment,
8 he would not have made such a statement. This Court reviews the ALJ's decision; because the
9 ALJ failed to make any mention of CFS and its impact on Ms. Schiffman's ability to work, the
10 Court cannot accept the Commissioner's argument that the ALJ considered the medical evidence
11 pertaining to CFS and incorporated the limitations established by the evidence in assessing Ms.
12 Schiffman's residual functional capacity.

13 Additionally, the Court cannot accept the argument that the ALJ's failure to address Ms.
14 Schiffman's CFS is harmless. In assessing a claimant's residual functional capacity, the ALJ
15 must consider the limitations and restrictions caused by the claimant's medically determinable
16 impairments, including any related symptoms. SSR 96-8p. As discussed above, this did not
17 occur. The record shows at least three doctors diagnosed Ms. Schiffman with CFS: Dr.
18 Heilbrunn, Dr. Prickett, and Dr. Caldwell.⁷ The ALJ recognized Ms. Schiffman's claim that she
19 could not work revolved around fatigue, lack of stamina, and the need to rest. Tr. 14.
20 Consequently, the doctors' opinions that Ms. Schiffman suffered from Chronic Fatigue
21 Syndrome was significant evidence supporting her disability claim. An ALJ must explain why
22 "significant, probative evidence has been rejected," and must explain why uncontroverted

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⁷ See Tr. 235, 492, 494.

1 medical evidence is rejected. *Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th Cir. 1984). Here, the
2 ALJ erred by failing to explain, let alone mention, his assessment of the doctors' opinions
3 pertaining to CFS in assessing Ms. Schiffman's residual functional capacity.

4 **B. The ALJ's step two findings regarding mental impairments**

5 At step two, a claimant must make a threshold showing that (1) she has a medically
6 determinable impairment and (2) the impairment or combination of impairments is severe. *See*
7 *Bowen v. Yuckert*, 482 U.S. 137, 146 (1987); 20 C.F.R. § 404.1520(c), 416.920(c). Here, the
8 ALJ found Ms. Schiffman "has a reported history of dysthemic disorder and panic disorder" but
9 that "[her] medically determinable mental impairments . . . do not cause more than minimal
10 limitation in the claimant's ability to perform basic work activities and therefore are non-severe."
11 Tr. 11. Ms. Schiffman contends, and the Court agrees, the ALJ erred at step two by failing to
12 find her mental impairments were severe impairments.

13 The ALJ noted examining physician Ellen Lind, Ph.D., diagnosed Ms. Schiffman with
14 dysthemia and panic disorder and assigned Ms. Schiffman a "GAF of 41 suggesting disability."
15 *Id.* The ALJ rejected the GAF score⁸ which suggested disability on the grounds that Dr. Lind
16 noted Ms. Schiffman's mental status was within normal limits and that Dr. Lind "seems to have
17 considered Ms. Schiffman's subjective reports of physical ailments as well." *Id.* GAF scores are
18 relevant and should be considered. *See Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001).
19 The ALJ can discount GAF scores where the ALJ gives specific, legitimate reasons such as
20 findings of other physicians that contradict the scores. *See Andrews v. Shalala*, 53 F.3d 1035,

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22 ⁸ A GAF Score of 41-50 indicates serious symptoms or a serious impairment in social,
23 occupational, or school functioning. *See* (Am. Psychiatric Ass'n, Diagnostic and Statistical
Manual of Mental Disorders, 32 (4th ed. 1994) ("DSM IV").

1 1041 (9th Cir. 1995). Here, neither of the reasons the ALJ gave to reject the GAF scores are
2 supported by substantial evidence. A mental status examination indicating a claimant is within
3 normal limits does not establish the claimant's mental impairments are not severe. This is
4 highlighted by the opinions of Dr. Anita Peterson, Ph.D., a reviewing physician, who found Ms.
5 Schiffman is "credible for depression and occasional panic disorder [secondary] to her physical
6 problems." Tr. 229. "She has chronic dysthemia, exacerbated because of her functional losses,
7 but is not in tx [treatment]. Her ADLs (adult living activities) reflects intact executive function
8 and social support." *Id.* Nonetheless, Dr. Peterson opined that Ms. Schiffman's mental
9 problems were severe impairments because they imposed moderate limitations in concentration,
10 pace and persistence. Tr. 227-28. As illustrated by Dr. Peterson's opinion, a claimant can have
11 intact cognitive functioning, i.e., normal mental status, and still suffer from a severe mental
12 impairment.

13 The ALJ also discounted Dr. Lind's opinions on the grounds that the doctor "seems to
14 have considered" some of Ms. Schiffman's subjective reports of physical ailments. This is a
15 cryptic statement and not a specific and legitimate reason to reject Dr. Lind's opinion. Certainly,
16 an ALJ may give less weight to a medical opinion that is based to a large extent on a claimant's
17 self-reports that have been properly discounted as incredible. *Tommasetti v. Astrue*, 533 F.3d
18 1035, 1041 (9th Cir. 2008). Here, however, there is little to show Dr. Lind's opinions about Ms.
19 Schiffman's mental health problems were largely based on Ms. Schiffman's reports about her
20 physical problems. Rather, the doctor separated Ms. Schiffman's physical problems under AXIS
21 III, from the diagnoses of dysthemic disorder and panic disorder she made under AXIS I and II.⁹
22 Tr. 209. Moreover, the doctor noted Ms. Schiffman's physical problems under AXIS III were

23 ⁹ Axis I includes clinical disorders, Axis II includes personality disorders, and Axis III include general medical conditions. See DSM-IV at 27.

1 based on “numerous health conditions, per medical records,” and not the statements Ms.
2 Schiffman made to the doctor.

3 The ALJ also noted Dr. Anita Peterson, Ph.D., a reviewing physician, opined Ms.
4 Schiffman’s mental impairments were severe “because they imposed moderate limitations in
5 concentration, persistence, and pace.” Tr. 11. The ALJ rejected Dr. Peterson’s opinions stating
6 that “the longitudinal record from her treating doctor show[s] the claimant has no signs or
7 symptoms of a severe mental impairment that would interfere with work activities.” *Id.* This is
8 not a specific and legitimate reason to reject the doctor’s opinion. To reject a medical opinion,
9 an ALJ must set out a detailed and thorough summary of the facts and conflicting evidence,
10 stating his interpretation of the facts and evidence, and making findings. *Magallanes v. Bowen*,
11 881 F.2d 747, 751 (9th Cir. 1989). The ALJ must do more than offer his conclusions; he must
12 also explain why his interpretation, rather than the treating doctor’s interpretation, is correct.
13 *Orn v. Astrue*, 495 F.3d 625, 632 (9th Cir. 2007) (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22
14 (9th Cir. 1988)). Here, the ALJ found Ms. Schiffman’s treating doctor’s records showed no signs
15 of severe impairment. Dr. Peterson, who reviewed the same medical records came to the
16 opposite conclusion finding, Ms. Schiffman had moderate limitations in her ability: to
17 understand and remember detailed instructions; to maintain attention and concentration; to
18 perform activities within a schedule and maintain regular attendance; to complete a normal
19 workday or workweek due to psychological symptoms; to interact with the public; and to
20 respond to changes in the workplace. Tr. 227-28. Dr. Peterson also found Ms. Schiffman was
21 “credible for depression and occasional panic attack [secondary] to physical problems.” Tr. 229.
22 Given the conflict in the assessment of the medical record and the significant impairments found
23 by Dr. Peterson, the ALJ was required to explain why his interpretation of the medical evidence,

1 rather than Dr. Peterson's interpretation was correct. The ALJ failed to do so and thus erred.

2 **C. The ALJ's evaluation of Ms. Schiffman's credibility**

3 Ms. Schiffman contends the ALJ erred in rejecting her testimony. The ALJ did not find
4 Ms. Schiffman was malingering and may thus reject her testimony about the severity of the
5 symptoms only by making specific findings stating clear and convincing reasons for doing so.
6 *Smolen v. Chater*, 80 F.3d 1273, 1283-84 (9th Cir. 1996). The ALJ gave three reasons for
7 rejecting Ms. Schiffman's testimony. First, the ALJ stated "her problem is fatigue and lack of
8 stamina that requires rest period and naps, precluding sustained working and other activities. But
9 the medical reports, while noting her complaints of fatigue and weakness do not show any **signs**
10 of these problems." Tr. 14 (emphasis added). This is not a clear and convincing reason to reject
11 Ms. Schiffman's testimony. In social security proceedings, "signs" is a term of art associated
12 with findings made at step two of the disability evaluation process. To satisfy step two's
13 requirement of a medically determinable impairment, a claimant must prove the existence of a
14 physical or mental impairment by providing medical evidence consisting of **signs**, symptoms,
15 and laboratory findings; the claimant's own statement of symptoms alone will not suffice. 20
16 C.F.R. § 416.1508; *see also* Social Security Ruling (SSR) 96-4p¹⁰ (the existence of a medically
17 determinable mental impairment must be established by medical evidence consisting of signs,
18 symptoms, and laboratory findings; under no circumstances may the existence of an impairment
19 be established on the basis of symptoms alone).

20 SSR 96-4p also notes the difference between symptoms and signs: "symptoms . . . are an
21 individual's own perception or description of the impact of his or her physical or mental

22 ¹⁰ "SSRs do not have the force of law" but "represent the Commissioner's interpretation of the
agency's regulations." *Holohan v. Massanari*, 246 F.3d 1195, 1202 n. 1 (9th Cir. 2001).
23 However, they are given "some deference" as long as they are consistent with the Social Security
Act and regulations. *Id.* (citation omitted).

1 impairment(s) . . . [W]hen any of these manifestations is an anatomical, physiological, or
2 psychological abnormality that can be shown by medically acceptable clinical diagnostic
3 techniques, it represents a medical ‘sign’ rather than a ‘symptom.’” SSR 96-4p, at n.2; *see also*
4 20 C.F.R. §§ 404.1528(a)-(b). Hence, at step two, regardless of how genuine an individual’s
5 complaints are, the existence of a medically determinable mental impairment cannot be
6 established in the absence of objective medical abnormalities; i.e., medical signs and laboratory
7 findings. If there are no medical signs or laboratory findings to substantiate the existence of a
8 medically determinable mental impairment, the individual must be found not disabled at step two
9 of the sequential evaluation process. *See* SSR 96-4p; *Ukolov v. Barnhart*, 420 F.3d 1002, 1005
10 (9th Cir. 2005).

11 By rejecting Ms. Schiffman’s testimony because “the medical reports, while noting her
12 complaints of fatigue and weakness do not show any **signs** of these problems,” the ALJ
13 incorrectly used the standards applicable at step two in determining whether Ms. Schiffman had
14 a medically determinable impairment. The ALJ erred because once medical evidence of an
15 underlying impairment has been shown, medical findings, or signs, are not required to support
16 the alleged severity of the symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991). If
17 there is evidence of a medically determinable impairment likely to cause an alleged symptom
18 and there is no evidence of malingering, the ALJ must provide specific and cogent reasons for
19 rejecting a claimant’s subjective complaints. *Id.* at 346. Here, the Commissioner concedes Ms.
20 Schiffman’s CFS should have been deemed a medically determinable and severe impairment at
21 step two and that the ALJ erred in so finding. The ALJ’s error in failing to find CFS to be a
22 severe impairment carried over to the ALJ’s assessment of Ms. Schiffman’s credibility—the ALJ
23 impermissibly relied on his finding there are no “signs” supporting CFS to reject her testimony

1 about her fatigue symptoms. Accordingly, the ALJ erred by relying on the lack of “signs” to
2 discredit Ms. Schiffman’s testimony about fatigue and weakness.

3 Second, the ALJ rejected Ms. Schiffman’s testimony on the grounds that she submitted a
4 letter of resignation indicating that she “quit work because she wanted to be a stay-at-home mom
5 and take care of her family, rather than join the world of the competitive labor market.” Tr. 14.
6 Ms. Schiffman’s letter does not support this finding. Her letter states in pertinent part:

7 God has been so good to me here at the house. I feel very
8 fortunate to have gotten to be a part of the work here. Yet God has
9 made it very clear to me that I am to step back from this job to be
10 at home with my family. I have so few hours in the day they need
11 to be spent where I am needed and can be the most effective for
12 him. I am physically unable to give the time that is needed for this
13 job. I would still like to be involved with things such as Board
14 meetings, events, lunches, interviews, occasional help in the office
15 if needed. As long as that is ok with the board members and my
16 health allows it.

17 Tr. 94. This letter is not clear and convincing evidence that Ms. Schiffman quit work for
18 secondary gain—to stay at home—instead of health reasons. Rather, Ms. Schiffman clearly
19 states she is physically unable to give the time needed for her work. The Court thus finds
20 substantial evidence does not support the ALJ’s finding that Ms. Schiffman stopped working to
21 be a stay-at-home mom, rather than for health reasons.

22 And third, the ALJ rejected Ms. Schiffman’s testimony on the grounds that she “is fine at
23 home but would have problems in the workplace because she cannot deal with the additional
demands required for full time work.” Tr. 14. None of the statements Ms. Schiffman has made
support this finding. Her letter of resignation does not support this finding as nowhere in the
letter does she indicate that she is “fine at home.” The testimony she gave at her hearing and the
statements she made in her written function report do not support this finding. She testified that
she tried working at home but could not; that she functions “normally” at home a total of

1 approximately three hours in an eight hour day; that she struggles with washing her hair and
2 bathing; and that she relies on her teen-aged daughter to take care of many family duties such as
3 cooking, cleaning and shopping. Tr. 25, 26, 31-34, 139-42.

4 **CONCLUSION**

5 For the foregoing reasons, the Court recommends that the Commissioner's decision be
6 **REVERSED** and the case be **REMANDED** for further administrative proceedings. The Court
7 finds the ALJ erred in failing to find Chronic Fatigue Syndrome, dysthemia and anxiety/panic
8 disorder to be severe impairments at step two of the disability determination process. The Court
9 also concludes the ALJ erred in rejecting the testimony of Ms. Schiffman. On remand, the ALJ
10 should consider Chronic Fatigue Syndrome, dysthemia and anxiety/panic and the other
11 impairments previously found to be severe impairments to be severe impairments at step two,
12 Utilizing the remaining steps in the five step disability determination process, the ALJ should
13 evaluate these impairments and develop the medical record as necessary. The ALJ should
14 reevaluate the testimony of Ms. Schiffman and reevaluate her residual functional capacity at step
15 four and step five, utilizing a vocational expert if deemed necessary.

16 Objections, if any to this Report and Recommendation must be filed and served no later
17 than **September 14, 2011**. If no objections are filed, the matter will be ready for the Court's
18 consideration on that date. If objections are filed, any response is due within 14 days after being
19 served with the objections. A party filing an objection must note the matter for the Court's
20 consideration 14 days from the date the objection is filed and served. Responses to objections
21 must be filed no later than 14 days after being served with objections. Objections and responses
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1 shall not exceed twelve pages. The failure to timely object may affect your right to appeal.

2 DATED this 30th day of August, 2011.

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5 BRIAN A. TSUCHIDA
6 United States Magistrate Judge
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